United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

694

BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 23,100

Frank B. Simpson, Appellant

v.

United States of America, Appellee

Appeal from the United States District Court for the
District of Columbia

Glenn L. Archer, Jr.
Counsel for Appellant
Appointed by this Court
888 Seventeenth Street, N. W.
Washington, D. C. 20006

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

* Cases chiefly relied upon are marked by asterisks.

IN THE

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 23,100

Frank B. Simpson, Appellant

v.

United States of America, Appellee

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLANT

QUESTIONS PRESENTED

1. Whether incriminating evidence, prejudicial to appellant, was erroneously admitted without positive identification by the complaining witness, the alleged owner thereof.

2. Whether the absence of positive identification of the safety razor, recovered from the appellant at the time of his arrest, by the complaining witness, precludes the finding of the crime of petit larceny against appellant.

3. Whether it is required for a conviction of petit larceny, that property first be established to be owned by someone other than the accused, before it can be found that he intended to steal such property.

4. Whether the requisite intent, necessary for conviction of the crime of burglary, was established by the prosecution in the absence of the erroneous conviction of appellant of the crime of petit larceny.

This case has not previously been before this Court.

JURISDICTIONAL STATEMENT

A judgment of conviction was entered against the appellant on January 28, 1969, in the United States District Court for the District of Columbia under D. C. Code §§ 22-1801(b) and 22-2202, and thereafter an appeal was timely noted. On March 20, 1969 an

order was entered authorizing the appellant to proceed on appeal without prepayment of costs. Jurisdiction of this Court is invoked under 28 U.S.C. §1291.

REFERENCES TO RULINGS

NONE

STATEMENT OF THE CASE

In an indictment filed June 5, 1968, returned by a grand jury sworn in on April 23, 1968, the appellant, Frank B. Simpson, and one Donald H. Coe, not a party to this appeal, were charged in two counts with the crimes of second degree burglary and grand larceny. On January 28, 1969 the petit jury found the appellant and Donald H. Coe guilty of second degree burglary and petit larceny. Judgment of conviction was entered and this appeal was thereafter taken.

On or about January 30, 1968, in the District of Columbia, appellant Frank B. Simpson and Donald H. Coe, while in the home of one Alphonso Jackson, were arrested by two police officers. The police officers at the time of arrest were responding to a request made by Thomas L. Young, a tenant in the Jackson home. Appellant and Coe were thereafter charged with entering the dwelling of Thomas L. Young with the intent to steal property of another and

with stealing property of Thomas L. Young.

Young testified at appellant's trial that he left his dwelling about 10:20 p.m. on January 29, 1968 and before leaving turned off all the lights (T-9), and returned at approximately 12:00 midnight of the same day (T-13).

He stated that he sought the police officers because when he returned he noticed that all the lights were on and that he heard noises (T-14) "which sounded like footsteps, talking, sounded like somebody dropping something" (T-45). Upon the arrest of the appellant the police officers found a safety razor in his coat pocket. In addition to the various items of clothing and kitchenware which Young asserted were missing from the house when he returned (T 22-31), which the indictment charges totaled over $800.00, Young also asserted that his safety razor (T 31-32) valued at $2.00 was missing. None of the missing property was ever recovered (T-118).

The Government presented at trial the safety razor recovered from Simpson at his arrest, and on direct examination attempted to identify the razor as belonging to Young. The Government showed Young the razor and on direct examination in response to a question by the Government asking him if there was "anything about this particular razor that is any different from any of the one million or two million razors which may be present in the United States?", Young answered: "I can't say that there is any difference." (T-34).

Young never identified the razor as his own razor and on cross examination he testified that there was no way he could identify the razor, recovered from Simpson, as belonging to him, other than that it resembled his own razor (T-49). The trial court, over objection, admitted the razor into evidence, but took judicial notice of the fact that a large number of razors of the type admitted were manufactured (T-119).

Simpson testified that the razor recovered from his person was his, and that he was taking it home with him from his place of employment, a movie theatre. He further testified that he used the razor at the theatre in order to shave, and that the night of his arrest he had the razor in his coat pocket (T-150).

The reason given by appellant for entering Jackson's home was that he desired to borrow money from Mr. Jackson, that he had borrowed money many times in the past from him, and when Mr. Jackson did not answer the door on that particular night, he and Donald Coe entered the house and called for Jackson (T-124).

Simpson and Coe were subsequently arrested and charged with grand larceny and second degree burglary. The Court instructed the jury as to second degree burglary, grand larceny and petit larceny, and the jury returned a verdict of guilty of second degree burglary and petit larceny.

STATUTES AND RULES INVOLVED

DISTRICT OF COLUMBIA CODE:

§ 22-1801. Housebreaking [1]

Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years.

§22-1801. Burglary[2]

(b) Except as provided in subsection (a) of this section, whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building or any apartment or room, whether at the time occupied or not, or any steamboat, canalboat, vessel, or other watercraft, or railroad car or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be guilty of burglary in the second degree. Burglary in the second degree shall be punished by imprisonment for not less than two years nor more than fifteen years.

1/ As in effect prior to enactment of PL 90-226(1967).

2/ As in effect after enactment of PL 90-226(1967).

§22-2202. Petit larceny

Whoever shall feloniously take and carry away any property of value of less than $100, including things savoring of the realty, shall be fined not more than $200 or be imprisoned for not more than one year, or both. And in all convictions for larceny, either grand or petit, the trial justice may, in his sound discretion, order restitution to be made of the value of the money or property shown to have been stolen by the defendant and made way with or otherwise disposed of and not recovered.

§ 22-3102. Unlawful entry on property

Any person who, without lawful authority, shall enter, or attempt to enter, any public or private dwelling, building or other property, or part of such dwelling, building or other property, against the will of the lawful occupant or of the person lawfully in charge thereof, or being therein or thereon, without lawful authority to remain therein or thereon shall refuse to quit the same on the demand of the lawful occupant, or of the person lawfully in charge thereof, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $100 or imprisonment in the jail for not more than six months, or both, in the discretion of the court.

FEDERAL RULES OF CRIMINAL PROCEDURE

RULE 52. HARMLESS ERROR AND PLAIN ERROR

(b) Plain Error. Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

SUMMARY OF ARGUMENT

Point I

Admission of the safety razor into evidence without positive identification was erroneous and prejudicial to appellant. In order for one to be convicted of the crime of petit larceny, it must be proven that he intended to steal the property of another. Before the Court could find such intention, it must be first established that the property in question actually belonged to another. In the case at hand, the safety razor found on appellant at his arrest, which led to his conviction of petit larceny, was never identified as the property of another. The complaining witness, Thomas L. Young, merely testified at trial that it resembled his own razor, but that, in fact, he could not truthfully identify the razor as his own.

Since the razor in question was never established to be the property of anyone other than appellant, it should not have been admitted in evidence to be used against him. The admission of the razor into evidence confused the jury whereby they, thereafter, could easily have believed, though wrongfully, that because the razor was admitted into evidence, they were required to find that it belonged to the complaining witness, Thomas L. Young, and not the appellant, Frank B. Simpson.

Without first establishing that the razor belonged to someone other than the appellant, the government could not and did not prove the criminal intent of the appellant to permanently deprive the rightful owner of his property. Therefore, appellant could not be guilty of petit larceny.

Point II

In order to be convicted of the crime of second degree burglary, it is necessary that the accused be found to have entered a dwelling, with the intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or with the intent to commit any criminal offense. A conviction of a crime committed while within such dwelling satisfactorily establishes the intent required for a conviction of burglary. But when no conviction of such crime is found, the prosecution must otherwise establish the requisite intent. In the case at hand, the government has not established the essential element of the crime of second degree burglary, namely the intent to commit a criminal [illegible] offense, since the conviction of petit larceny was erroneous. The jury acquitted appellant of the charge of grand larceny and only through the erroneously admitted evidence (i.e., the safety razor) did the jury convict appellant of petit larceny. In the absence of such conviction, the jury had nothing upon which to find

the requisite intent upon which to convict appellant of second degree burglary.

ARGUMENT

I. A. Admission of the Safety Razor into Evidence Without Establishing Its Ownership Was in Error and Prejudicial to Appellant.

Although a safety razor was found on appellant at the time of his arrest and the complaining witness alleged that his safety razor was missing; before the safety razor found on appellant was admitted into evidence, it should have been established that it was the same razor that was owned by the complaining witness. The failure of the government to so prove and the subsequent admission by the Court was error and clearly prejudicial to appellant. In McGilton v. United States, Mun. Ct. of Appeals, D. C., 140 A.2d 190 (1958), the Court reversed a conviction of petit larceny on the ground that there was no proof that the evidence admitted, a suede jacket, was the property of another. In the McGilton case, appellant was arrested a block and a half from Woodward and Lothrop's store along with one named Gardener. The arresting policy officer recovered from McGilton a suede jacket which he had stuck under the coat he was wearing, and from Gardener the officer recovered items which were thereafter positively identified as coming from Woodward and Lothrop. At trial an employee of Woodward and Lothrop testified that he identified the suede jacket by its appearance and McGregor label as a type

sold in the store, but could not positively identify it as coming from the store, and he admitted this type of jacket was sold in various stores in the city. The trial court admitted this testimony and the jacket in evidence. The Court on appeal held that, even though appellant admitted, at the time of his arrest, that he stole the merchandise from Woodward and Lothrop, the only other evidence against him was that he was standing near the store with a suede jacket under his coat. The Court stated that there was no proof that Woodward and Lothrop was the owner of the property or that it was lost to its owner by a felonious taking and carrying away. In the case at hand, it was never proved that Young was the owner of the property or that it was lost to him by a felonious taking; and furthermore, appellant herein did not at the time of his arrest admit to any stealing or criminal intent. The District of Columbia Court of Appeals has said that one would be guilty of larceny only if his possession was clearly adverse and contrary to the interest of its rightful owner. Ray v. United States, D. C. App., 229 A.2d 161 (1967). Appellant's possession could not be deemed adverse or contrary unless it was first established that another was the owner of the razor.

In Davis v. United States, D.C. App., 230 A.2d 485 (1967), a store had been entered and robbed, appellants were apprehended and cigarette

packs were recovered from them. One of the packs had the same "wholesale number" on the wrapper as those remaining in the burglarized store, but the Court said that the wholesale numbers on the cigarettes was considered coincidental at trial and the cigarettes could not be identified as having come from the store in question. In the case at hand, Young, the complaining witness, testified that there was no way for him to identify the razor as his, but yet it was admitted into evidence, while in the Davis case the cigarettes had at least some identifying mark but it was not admitted.

The admission of the safety razor as the property of Young was mere conjecture and hypothetical. It should not have been admitted and the admission constituted plain error which was prejudicial to the appellant.

In Green v. United States, D.C. App., 251 A.2d 652 (1969), appellant asserted as fatally defective the petit larceny information because it failed to allege the ownership of the television set, the subject of the larceny. The government conceded the validity of the claim and did not oppose reversal. Appellant herein asserts as fatally defective, the admission of the safety razor without establishing its ownership, as that of the complaining witness, the subject of the larceny; and contends that this admission was plain error and prejudicial, which led to his conviction of petit larceny.

B. Intent to Permanently Deprive the Rightful Owner of His Property Was Not Proved.

In order to establish the crime of larceny, it must be shown that the defendant without right took and carried away the property of another with the intent to permanently deprive the rightful owner thereof. Durphy v. United States, D.C. App., 235 A.2d 326(1967). Before the intention to steal can be proved, it must first be established that the property alleged to have been stolen, belonged to another. And then and only then, could it be shown that appellant had the intention to permanently deprive the owner of his property. Here, appellant was found with a safety razor in his pocket and because of this, appellant was found guilty of petit larceny. The prosecution never established that this razor belonged to another and therefore the Government could not prove that appellant intended to steal the razor, for one could not intend to steal that which is already his. Since the Government has not proved that the razor was owned by Young, the complaining witness, no intent to steal Young's property could be determined by the jury, for the Government has not otherwise proved any criminal intent to substantiate the conviction of petit larceny. Absent the safety razor, the Government has established no crime whatever. The indictment against appellant charges in the second count that he stole property of Thomas L. Young consisting of various clothing items

and dishes and silverware and also one safety razor. The value of all the items totaled $827.00; the value of the safety razor was $2.00. The petit jury acquitted appellant of the charge of grand larceny and found appellant guilty of petit larceny. This conviction could only have resulted due to the recovery of the safety razor found on appellant at the time of his arrest. None of the other items were ever recovered and the only evidence to substantiate the conviction of petit larceny is the safety razor. Since it never was established to be owned by Young, it should not have been admitted into evidence, and to do so constituted plain error. Therefore, without the safety razor as evidence, no criminal intent was proved to substantiate the conviction of petit larceny, which must therefore be reversed.

II. A. No Intent to Steal Property has been Proved to Substantiate Conviction of Burglary

In order to be convicted of second degree burglary the Government must establish the essential elements of the crime, one of which is the intent to commit a criminal offense. Lee v. United States, 37 U.S.App.,D.C. 442(1911).

The indictment against appellant charges in count one that appellant entered the dwelling of Thomas L. Young with the intent to steal property of another. Appellant contends that in the absence of the erroneous conviction of petit larceny, the Government has not established the intent to steal another's property as charged in the indictment. A conviction of burglary requires the finding of larcenous intent, Stewart v. United States, 324 F. 2d 443 (1963). In Stewart the court said that since the jury found the appellant guilty of larceny as well as housebreaking, it must have determined that larcenous intent was present. In the case at hand, therefore, it must be assumed that since the jury found appellant guilty of petit larceny, they could have assumed the larcenous intent required for a conviction of burglary. Here though, since the conviction of appellant of petit larceny was erroneous, the jury could not thereafter find the larcenous intent required for conviction of second degree burglary.

In Wood v. United States, 120 U.S. App.,D.C. 163, 344 F.2d 548 (1965), the Court said that since there was testimony that appellant possessed stolen property so near to the time and place of the theft, the jury may infer guilt both to larceny and housebreaking. In the case at bar, there was no testimony that the appellant possessed stolen property, only that he possessed a razor similar to Young's. In Wood there was testimony that the television set was stolen which appellant had placed in his sister's home. No such testimony was presented herein, but only that a razor had been recovered.

B. Finding of Guilty of Petit Larceny was an Acquittal of Grand Larceny

The trial court instructed the jury that they could find appellant guilty or not guilty of burglary, and guilty or not guilty of grand larceny or the lesser included offense of petit larceny. The finding, by the jury, of the appellant guilty of petit larceny was,in effect, an acquittal of the charge of grand larceny. Green v. United States, 355 U.S. 184, 2L.ed.2d 199, 78 S.Ct. 221(1957). In Green, defendant was convicted at his first trial of second degree murder and at his second trial of first degree murder. The Supreme Court said that the jury's verdict was an implicit acquittal on the charge of first degree murder. The Supreme Court reversed the U. S. Court of Appeals for the District of Columbia which said that the appellant Green could again be tried for the crime charged in the

indictment, Green v. United States, 98 U.S. App.,D.C. 413, 236 F.2d 708(1956).

Based on the Supreme Court's decision in the Green case, appellant asserts, therefore, that he was implicitly acquitted of the charge of grand larceny by his conviction of petit larceny.

C. Government cannot Rely on Grand Larceny Charge to Prove Intent to Steal Another's Property

Because of appellant's acquittal of grand larceny, the Government must prove intent to commit larceny on the ground of petit larceny and since the conviction of petit larceny was erroneous, the Government has not established the essential element of intent to steal and, therefore, the conviction of second degree burglary must be reversed.

The Government produced testimony of the arresting policy officers wherein it was stated that the appellant was attempting to hide. This in itself does not create a presumption of guilt. Wright v. United States, 116 U.S. App.,D.C. 60, 320 F.2d 782, 783 (1963). In Wright the Court said that flight does not create a presumption of guilt. In Carter v. United States, 102 U.S. App.,D.C. 227,252 F.2d 608(1957), the court said "unless there is substantial evidence of facts which exclude every reasonable hypothesis but that of guilt, the verdict must be not guilty . . ." Here the only fact upon which appellant was found guilty was that he possessed a razor

that resembled Young's, but which was never identified as being Young's. Appellant contends that the Government has failed to establish the intent to steal another's property, which is required for a conviction of second degree burglary herein, and therefore, a reversal of said conviction is required.

D. Modification of the Conviction of Second Degree Burglary

Appellant contends in the alternative that the conviction of second degree burglary should be reduced to unlawful entry on property (D. C. Code §22-3102), because the evidence of the case fails to support the elements of the crime of burglary, but sufficiently sustains all the elements of the included offense of unlawful entry. Austin v. United States, 127 U.S. App.,D.C. 130, 382 F.2d 129(1967). In Austin the Court held that a federal appellate court has "the power to modify a criminal judgment, to reduce the conviction to that of a lesser included offense, where the evidence fails to support one element of the crime of which appellant was charged and convicted but sufficiently sustains all the elements of the included offense."

E. Plain Error

Under Rule 52(b), Federal Rules of Appellate Procedure, the Court of Appeals may notice errors affecting substantial rights even though they were not brought to the attention of the trial court.

Durham v. United States, 99 U.S. App.,D.C. 132, 237 F.2d 760(1956); Bradley v. United States, 102 U.S. App.,D.C. 17, 249 F.2d 922(1957). In the case at bar, appellant contends that the admission of the safety razor into evidence, which led to the conviction of petit larceny, and the absence of the establishment of criminal intent to the charge of burglary and a conviction thereon was plain error.

CONCLUSION

For the foregoing reasons the appellant respectfully requests:

1. That the judgment of conviction of petit larceny be reversed;

2. (a) that the judgment of conviction of second degree burglary be reversed or, in the alternative,

(b) that the judgment of conviction of second degree burglary be reduced to unlawful entry on property.

Respectfully submitted,

Glenn L. Archer, Jr.
Counsel for Appellant
Appointed by this Court
888 Seventeenth Street, N. W.
Washington, D. C. 20006

CERTIFICATE OF SERVICE

This will certify that I served the foregoing brief upon the United States of America this 29th day of August, 1969, by placing a copy thereof in the United States mails, postpaid, addressed to the United States Attorney, United States Court House, Washington, D. C. 20001.

Attorney for Appellant

REPLY
BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

No. 23,100

United States of America, Appellee

v.

Frank B. Simpson, Appellant

Appeal from the United States District Court for the District of Columbia

---

Glenn L. Archer, Jr.
Counsel for Appellant
Appointed by this Court
888 Seventeenth Street, N.W.
Washington, D. C. 20006

TABLE OF CONTENTS

IN THE
UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 23,100

United States of America, Appellee
v.
Frank B. Simpson, Appellant

Appeal from the United States District Court for the District of Columbia

REPLY BRIEF FOR APPELLANT

REPLY ARGUMENT

ARGUMENT I.

The razor found on appellant was erroneously introduced into evidence.

Appellant agrees with appellee that the entire case is centered around the two dollar safety razor introduced into evidence. Both convictions arise from the introduction of the safety razor, for without, there would be no basis for a conviction of petit larceny or second degree burglary.

As indicated in appellee's brief, under Counterstatements Of The Case, Mr. Young, the complaining witness, "testified that numerous articles were missing from his house,

including suits, shoes, shirts, underclothes, a topcoat, dishes, silverware and a razor. He said the approximate value of all these items amounted to $930. (TR-22-23)" (Emphasis added) Yet, at the time of Simpson and Coe's arrest, which occured on the premises, the only item recovered was a safety razor, (T-81), which Simpson testified belonged to him (T-150), and at no time thereafter was any of the described missing property recovered (T-118).

Only after the question was propounded by the Court did the complaining witness respond to the question of whether the razor, identified as Government's Exhibit No. 1, was "the same type and make and does it fit the description of the razor which you had missing on that evening?" (T-35) Before this, Mr. Young had stated that there was nothing about this particular razor that is any different from any of the one million or two million razors which may be present in the United States. (T-34) Thereafter, on cross examination, Mr. Young again stated he could not identify the razor as being the one that belonged to him other than that it looked like the one he had. (T-49)

Appellant submits therefore that, when the Court took judicial "notice of the fact that they (Gillette Manufacturing

Company) manufactured a whole mess of them" (razors) (T-119,120), and almost immediately thereafter admitted the razor into evidence, the admission of the safety razor was plain error. The admission of the razor into evidence was clearly prejudicial to appellant for the jury could easily have believed thereafter, though wrongfully, that they were required to find that it belonged to the complaining witness.

Even though appellant's counsel in the lower court did not object to the introduction of the razor, but co-defendant's counsel did object (T-119), appellant maintains that its introduction, without proper identification was erroneous. The record clearly shows that the razor was never identified by Mr. Young as his, only that it resembled his razor.

ARGUMENT II.

There is not sufficient evidence to affirm appellant's convictions of second degree burglary and petit larceny.

Appellant submits that the evidence at trial was insufficient to enable the jury to find him guilty beyond a reasonable doubt. At the time of his arrest, Simpson was said to be attempting to hide(T-78). As indicated in appellant's main brief (p. 18), hiding alone does not create a presumption of guilt.

No burglary tools or anything capable of breaking into the home were found about the premises or on Simpson or Coe, and no

evidence, except the razor, upon which Simpson could have been found guilty of petit larceny was presented at trial and appellee has not otherwise established an intent to commit a crime required for conviction of second degree burglary.

Appellant concedes that possession of stolen property at the time and at the scene of a burglary, would present clear and overwhelming evidence sufficient to sustain a conviction of second degree burglary and petit larceny, but appellant maintains that such property must first be established to be "stolen property". In the case at hand, it was not established that the razor was stolen property, or that appellant possessed any stolen property.

CONCLUSION.

Therefore, for the reasons stated above, and in appellant's main brief, it is respectfully submitted that:

1. The judgment of conviction of petit larceny be reversed;

2. (a) the judgment of conviction of second degree burglary be reversed or, in the alternative,

(b) the judgment of conviction of second degree burglary be reduced to unlawful entry on property.

Respectfully submitted,

Glenn L. Archer, Jr.
Counsel for Appellant
Appointed by this Court
888 Seventeenth Street, N. W.
Washington, D. C. 20006

CERTIFICATE OF SERVICE

This will certify that I served the foregoing brief upon the United States of America this 24th day of November, 1969, by placing a copy thereof in the United States mails, postpaid, addressed to the United States Attorney, United States Court House, Washington, D. C. 20001.

Glenn L. Archer Jr.

Attorney for Appellant